

2023 Administrative Rulemaking Seminar

February 15, 2023





LEGISLATIVE SERVICES AGENCY

Promulgation through the Indiana Register & Indiana Administrative Code

George Angelone, Executive Director
Legislative Services Agency (“LSA”)



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Meaning of "Promulgate"

- **2a:** to make known or public the terms of (a proposed law)
- **2b:** to put (a law or rule) into action or force

[https://www.merriam-webster.com/dictionary/promulgate#:~:text=%3A%20to%20make%20known%20or%20public,rule\)%20into%20action%20or%20force](https://www.merriam-webster.com/dictionary/promulgate#:~:text=%3A%20to%20make%20known%20or%20public,rule)%20into%20action%20or%20force)



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Primary Avenue for Promulgation of Rules



“Eliminate "Desk Drawer Rules"”

Former Governor Otis Bowen

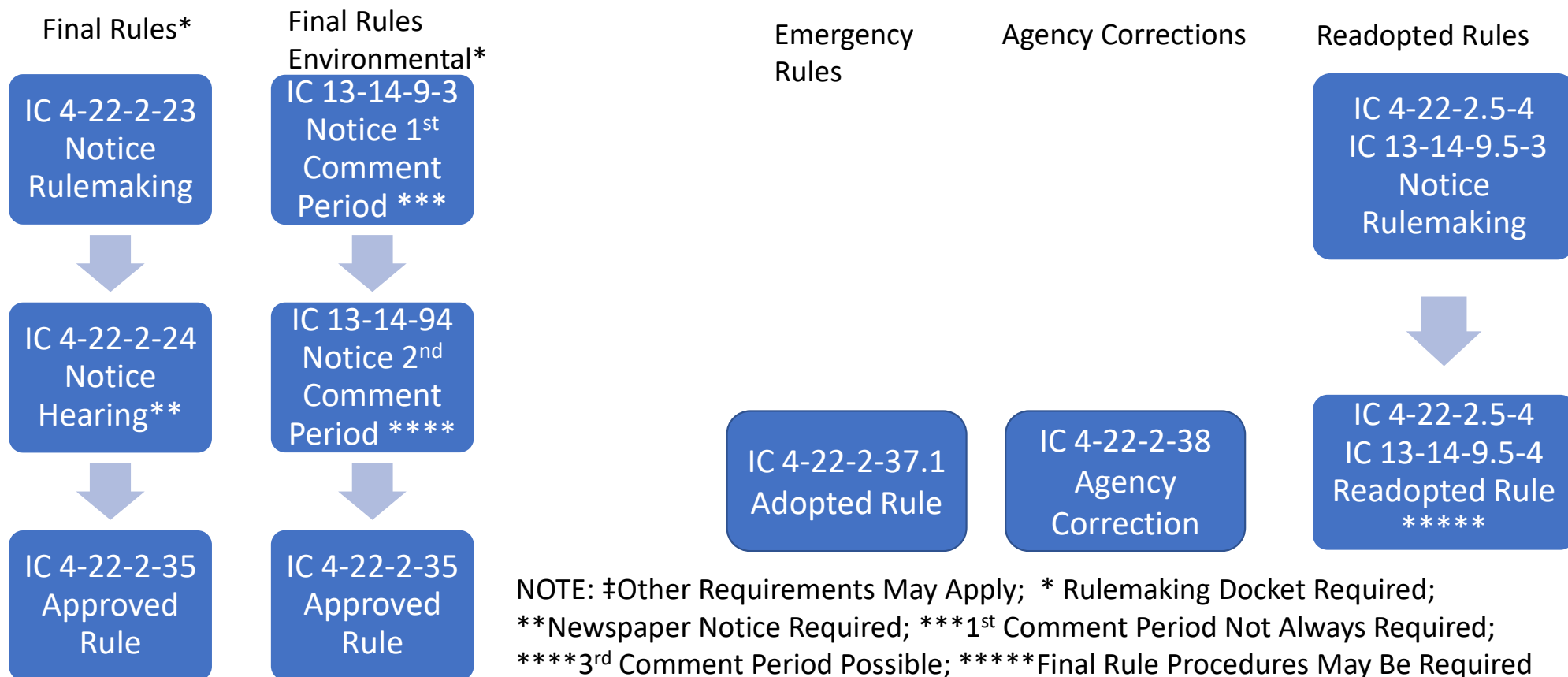
SAMPLE FEATURES OF INDIANA REGISTER & INDIANA ADMINISTRATIVE CODE

- Internet access
- Weekly publication of rulemaking notices & other submitted documents in *Indiana Register*
- Documents formatted in conformity with *Administrative Rules Drafting Manual*
- Related documents linked by assignment of a document control number
- Codification of permanent and General rules through 4-level citation number in *Ind. Admin. Code*
- Continuous update of *IAC*, displaying current rules regardless of when adopted
- Publication of certain non-rule policy documents in *Indiana Register*



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Ind. Register Used to Notify Public of Proposals





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b. Publisher Filing Required for Effectiveness

Final Rules

IC 4-22-2-35
+30 days

Final Rules
Environmental

IC 4-22-2-35
+30 days

Emergency
Rules

IC 4-22-2-37.1
+Upon Filing

Agency Corrections

IC 4-22-2-38
+45 days

Readopted Rules

IC 4-22-2-35
+30 days

NOTE: Delay between filing and effective date may be longer under certain circumstances; Publisher may decline to accept rule for filing under certain circumstances



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Promulgation through *Ind. Reg.* Mandatory

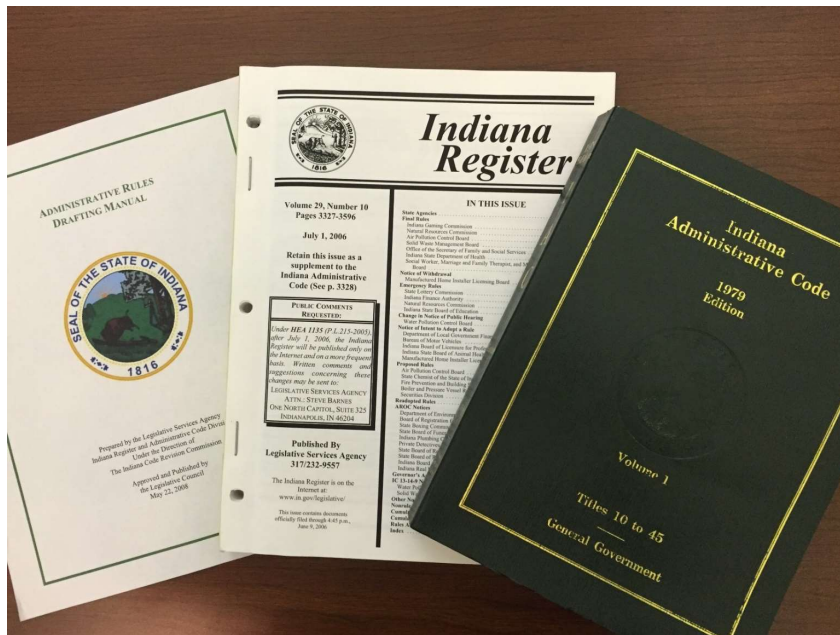
- **Failure to comply with IC 4-22-2 invalidates rule; exceptions**

Sec. 44. Except as provided in section 44.3 of this chapter [*Rules adopted before 9/1/1985 validated*], a rulemaking action that does not conform with this chapter is invalid, and a rule that is the subject of a noncomplying rulemaking action does not have the effect of law until it is adopted in conformity with this chapter.



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Published on the Internet (IC 4-22-8-2)



iga.in.gov

Indiana General Assembly

Search the current

Publications Login

Search the current

Rules	Publications
Administrative Rules Drafting Manual ↗	Handbooks
Administrative Code ↗	Tax Incentive Reviews
Indiana Register ↗	Tax Expenditure Reports
List of Agencies with Emergency Rulemaking Authority ↗	Workforce Related Program Reviews
	Property Tax Studies
	Fiscal Reports
	Evaluation Reports
	Other Reports
	Reports From Agencies
	Bill Drafting Manual ↗



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37 Document Types Published in *Ind. Register*

AC = Agency Correction

AF = Publisher's Receipt for Filed Document

AO = Attorney General's Opinions

AR = IC 4-22-2-19 and IC 4-22-2-25 Notices

AT = Request for Additional Time (Governor)

BF = IDEM Final Readoption

BN = IDEM Notice of Readoption

BP = IDEM Proposed Readoption

CH = Change in Notice of Public Hearing

DA = Disapproval by Attorney General

DG = Disapproval by Governor

EI = Economic Impact Statement

EO = Executive Orders

ER = Emergency Rule

FC = IDEM Continuation of First Notice

FD = IDEM Findings and Determinations

FI = IDEM Fiscal Impact Statement

FN = IDEM First Notice

FR = Final Rule

GP = Governor's Proclamations

NA = Notice of Rule Adoption

ND = Rule Activity Notice

NI = Notice of Intent to Adopt a Rule

NR = Nonrule Policy Document

OA = Objection to Errata (Attorney General)

OG = Objection to Errata (Governor)

ON = Other Notice

PC = Publisher's Correction

PH = Notice of Public Hearing

PR = Proposed Rule

RC = Notice of Recall

RF = Readopted Final Rule

RN = Notice of Intent to Readopt

RP = Readopt Proposed Rule

SC = IDEM Continuation of Second Notice

SN = IDEM Second Notice

WD = Notice of Withdrawal



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Weekly publication of rulemaking notices & other submitted documents in *Indiana Register*

- Rule Activity Notice
 - Each day at 5:00 p.m., if no document has been posted on the IR website that day, a Rule Activity Notice is generated and posted on the site in order to inform users that no documents have been or will be posted on that particular day.
- Publisher's Receipts for Filed Documents
 - Publisher's Receipts for Filed Documents are posted within three (3) business days of the delivery of a Final Rule (FR), Emergency Rule (ER), Agency Correction (AC), or Readopted Final Rule (RF) is filed with the Publisher on an "as filed" basis daily at 5:00 p.m. (IC 4-22-2-39(c))
- Other Documents
 - All other documents are published on the Indiana Register (IR) website on Wednesdays at 3:00 p.m.



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Submitting Documents to the *Ind. Register*

- Submit documents to Indiana Register and Administrative Code staff
- Staff prefers documents be submitted on any business day by email.
 - The email address for all electronic submissions for publishing in the Ind. Register is: register@iga.in.gov
 - However, any document may be submitted in person between the hours of 8:30 a.m. and 4:00 p.m. at IGCN, 100 N. Senate Ave., Room N201, Indianapolis. If documents are to be submitted in person, staff should be contacted in advance to avoid scheduling conflicts.
 - Exception-Governor submits packet for an approved Final Rule, not Agency
- For Help contact:
 - Heather Jarrett (317) 232-9557 heather.jarrett@iga.in.gov
 - Staci Yockey (317) 232-9564 staci.yockey@iga.in.gov



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Special Procedure for Submitting Rule Related Statements to Legislative Council

- Certain statements must also, separately be submitted to the Legislative Council under IC 4-22-2-28(h) and IC 4-22-2-28(i):
 - Estimated economic impact is more than \$500,000, electronically submit a Proposed Rule, not later than fifty (50) days before the public hearing, with all supporting data or information, to the Legislative Council. (IC 4-3-22-13; IC 4-22-2-28; IC 4-22-2.1-5).
 - Even if a rule does not have an estimated economic impact is more than \$500,000, IC 4-22-2-28 requires information prepared to comply with IC 4-22-2-19.5, IC 4-22-2-24, IC 4-22-2.1-5, IC 4-22-2.5-3-, IC 13-14-9-3, IC 13-14-9-4, or any other law requiring an analysis of the cost, economic impact, or fiscal impact of a rule to be submitted to the Legislative Council.
- Submissions to the Legislative Council related to a rule should be submitted by email to legislative.council@iga.in.gov.



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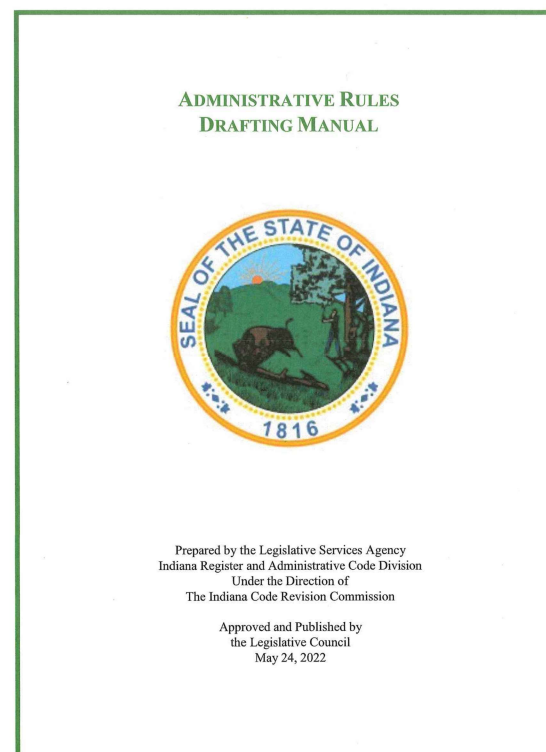
Documents formatted in conformity with *Administrative Rules Drafting Manual*

Nonconforming documents may be rejected by Publisher for failure to use required *format, numbering system, standards, and techniques*

IC 4-22-2-24; IC 4-22-2-31; IC 4-22-2-32;
IC 4-22-2-33; IC 4-22-2-35; IC 4-22-2-
37.1; IC 4-22-2-38; IC 4-22-2.5-4; IC 13-
14-9-3; IC 13-14-9-4; IC 13-14-9-5

Electronically available at:

<http://iac.iga.in.gov/iac/IACDrftMan.pdf>





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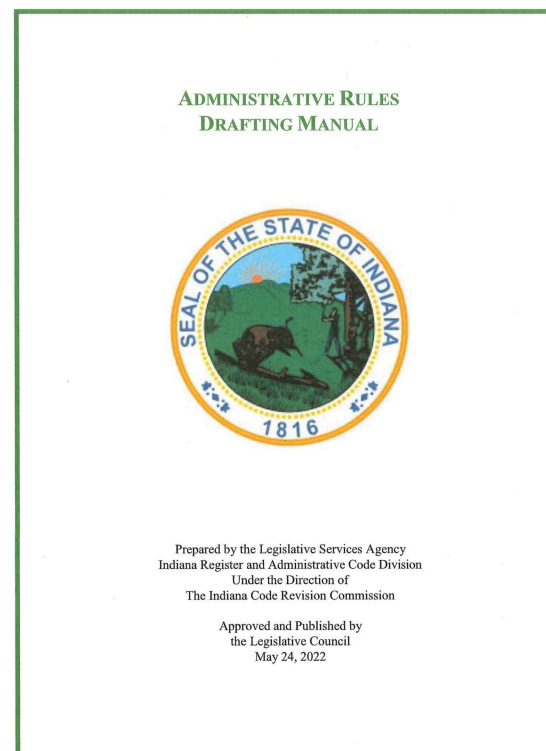
Lots of Template Examples in the *Administrative Rules Drafting Manual*

TITLE 329 SOLID WASTE MANAGEMENT BOARD

Notice of Withdrawal

LSA Document #06-182

Under IC 4-22-2-41, LSA Document #06-182, posted
at 20061115-IR329060182PRA, is withdrawn.





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Related documents linked by assignment of a document control number

- The Publisher assigns a unique number to each submitted document and another number that is used to link all related documents:
 - After July 1, 2006, each document that has been posted on the Indiana Register website is assigned a unique document identification number (DIN). A sample DIN is: 20151223-IR-410150039FRA
- Indiana Register and Administrative Code Division (IRACD) assigns an LSA document number to each Notice of Intent to Adopt a Rule, Emergency Rule, and Notice of Intent to Readopt at the time the document is submitted to the IRACD.
 - The number is in the format "LSA Document #07-209(F)" with the 1st 2 digits referencing the year of filing, the digits after the hyphen referencing the rulemaking action in order of filing in that year, and the parenthetical letter suffix (for certain documents) representing the type of action to which the document is related.
 - The LSA Document number must be included in any subsequent action related to the same rulemaking action.



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Related published documents are searchable by document control number

Title 465 Department of Child Services

DIN: 20221207-IR-465220289RFA (HTML - PDF)

Type: RF Posted: 12/07/2022 LSA Doc #22-289 Title 465

SECTION 1. UNDER IC 4-22-2.5-4, THE FOLLOWING ARE READOPTED: 465

IAC 2-14-6 "Successful adulthood services" defined 465 IAC 2-14-9

"Youth" defined 465 IAC 2-14-10 Requirements for deve...

DIN: 20221109-IR-465220289AFA (HTML - PDF)

Type: AF Posted: 11/09/2022 LSA Doc #22-289 Title 465

Publisher's receipt for LSA Document #22-289(F)

DIN: 20220928-IR-465220289RNA (HTML - PDF)

Type: RN Posted: 09/28/2022 LSA Doc #22-289 Title 465

OVERVIEW: Rules to be readopted without changes are as follows: 465

IAC 2-14-6 "Successful adulthood services" defined 465 IAC 2-14-9

"Youth" defined 465 IAC 2-14-10 Requirements for d...



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Codification of "permanent" rules through 4-level citation number in *Ind. Admin. Code*

- Rulemaking documents are organized into SECTIONS. A SECTION may add, amend, or repeal rule text with a short effective life or more permanent rule text.
- When adding, amending, or repealing more permanent rule text, the SECTION will identify the IAC number used to codify the text in the *Indiana Administrative Code*. For example (some text not shown):

SECTION 2. 357 IAC 1-5-2 IS AMENDED TO READ AS FOLLOWS:

357 IAC 1-5-2 Posting

Authority: IC 15-16-4-50; IC 15-16-5-44

Affected: IC 15-16-4; IC 15-16-5

Sec. 2. (a) At the time of each **commercial for hire** pesticide application identified...[text deleted for example]



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Codification of permanent rules through 4-level citation number in *Ind. Admin. Code*

- In our example, the elements of the affected IAC citation are:
 - 357 IAC refers to Title 357
 - 357 IAC 1 refers to Title 357, Article 1
 - 357 IAC 1-5 refers to Title 357, Article 1, Rule 5
 - 357 IAC 1-5-2 refers to Title 357, Article 1, Rule 5, Section 5
- Work with the Indiana Register and Administrative Code Division (IRACD) to identify the right IAC numbers for permanent rule text.



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Continuous update of IAC, displaying current rules regardless of when adopted

History lines & notes describe history of current rules & all rule transfers & repeals. In our example:

357 IAC 1-5-2 Posting

Authority: IC 15-16-4-50; IC 15-16-5-44

Affected: IC 15-16-4; IC 15-16-5

Sec. 2. (a) At the time of each commercial for hire pesticide application identified...[text deleted for example]

(Indiana Pesticide Review Board; 357 IAC 1-5-2; filed Apr 20, 1990, 4:35 p.m.: 13 IR 1702; errata, 13 IR 1861; filed Jun 9, 2000, 9:58 a.m.: 23 IR 2706; readopted filed Oct 29, 2001, 4:41 p.m.: 25 IR 936; readopted filed Sep 20, 2007, 1:47 p.m.: 20071010-IR-357070485RFA; readopted filed Dec 2, 2013, 4:00 p.m.: 20140101-IR-357130491RFA; readopted filed Dec 1, 2017, 9:25 a.m.: 20171227-IR-357170359RFA)



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Unique Status of Administrative Rules

IC 1-1-2-1 Hierarchy of law (Enacted 1852)

Sec. 1. The law governing this state is declared to be:

First. The Constitution of the United States and of this state.

Second. All statutes of the General Assembly of the state in force, and not inconsistent with such constitutions.

Third. All statutes of the United States in force, and relating to subjects over which Congress has power to legislate for the states, and not inconsistent with the Constitution of the United States.

Fourth. The common law of England, and statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the First (except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth,) and which are of a general nature, not local to that kingdom, and not inconsistent with the first, second and third specifications of this section.

IC 4-22-2-13

(b) "Rule" means the whole or any part of an agency statement of general applicability that:

(1) has or is designed to have the **effect of law**; and

(2) implements, interprets, or prescribes:

(A) law or policy; or

(B) the organization, procedure, or practice requirements of an agency.



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Publication of certain non-rule policy documents in *Indiana Register* (IC 4-22-7-7)

Attorney General's Opinions

Executive Orders

Official explanatory opinions of the State Board of Accounts based on an official opinion of the Attorney General

Any other statement that:

(A) that:

- (i) interprets, supplements, or implements a statute or rule;
- (ii) (ii) has not been adopted in compliance with IC 4-22-2;
- (iii) (iii) is not intended by its issuing agency to have the effect of law; and
- (iv) (iv) may be used in conducting the agency's external affairs; or

(B) that specifies a policy that an agency relies upon to:

- (i) enforce a statute or rule;
- (ii) conduct an audit or investigation to determine compliance with a statute or rule; or
- (iii) impose a sanction for violation of a statute or rule.

IC 4-22-7-7 includes information bulletins, revenue rulings (including, subject to IC 6-8.1-3-3.5, a letter of findings), and other guidelines of an agency.



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How can I help?





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An Overview of the Rulemaking Process

William H. Anthony
Assistant Chief Counsel, Advisory

Philip A. Gordon
Section Chief, Advisory



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Rulemaking: In General

“The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.’ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974)). The same principle is true here at the state level...”

Natural Resources Defense Council v. Poet Biorefining-North Manchester, LLC, 15 N.E.3d 555, 563 (Ind. 2014)



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Office of the Attorney General Advisory Division

- The Attorney General is the legal advisor to all agencies in the drafting and preparation of rules (IC 4-22-2-22)
- Agencies are encouraged to seek advice and assistance from the Advisory Division when promulgating rules



General Requirements

- Indiana Code 4-22-2, 4-22-2.1, 4-22-2.5
- Some agencies may have additional statutory requirements for rulemaking; consult your authorizing statutes
- See, e.g., IDEM boards have a separate rulemaking process governed by IC 13-14



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What is a rule?

"Rule" means the whole or any part of an agency statement of general applicability that:

- (1) has or is designed to have the effect of law; and
- (2) implements, interprets, or prescribes:
 - (A) law or policy; or
 - (B) the organization, procedure, or practice requirements of an agency.

IC 4-22-2-3(b)



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Rule or Policy?

A formal rulemaking is not required for “a resolution or directive of any agency that relates solely to internal policy, internal agency organization, or internal procedure and does not have the effect of law.”

IC 4-22-2-13(c)(1)



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Rule or Agency Action?

The rulemaking statute does not apply to an “agency action” – an adjudication resulting in an order that applies only to particular parties.

Hamilton Se. Utilities, Inc. v. Indiana Util. Regulatory Comm’n, 135 N.E. 2d 902, 913 (Ind. Ct. App. 2019)



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Indiana Administrative Code and Indiana Register

- Final (non-emergency) rules become part of the Indiana Administrative Code (IAC)
- Online at <http://iac.iga.in.gov/iac/>
- Documents related to pending rulemaking actions and emergency rules are in the Indiana Register:
<http://iac.iga.in.gov/iac/irtoc.htm>



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Important Resource

- An important resource to remember is the Administrative Rules Drafting Manual available at: <http://iac.iga.in.gov/iac/IACDrftMan.pdf>.



Rulemaking Moratorium

- Executive Order 13-03
Moratorium on Regulations
- Financial Management Circular 5.1 Regulatory Moratorium
Exceptions Procedure



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60 day deadline to begin rulemaking

- Rulemaking must begin within 60 days of effective date of statute authorizing rule (IC 4-22-2-19)
- If rulemaking will not begin within 60 days, notify Legislative Services Agency (LSA)
- LSA notice can be submitted after the 60 day deadline, at any point in the process
- See pages 50 and 51 of the Administrative Rules Drafting Manual for an example.



Exceptions to 60 day deadline

- Rule amends an existing rule
- Statute authorizing or mandating rule was enacted before June 30, 1995 (including statutes recodified after that date)
- Rule required to receive or maintain delegation, primacy, or approval for state implementation or operation of a program established under federal law



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Notice of Intent IC 4-22-2-23

- Publish in Indiana Register at least 28 days before proposed rule
- Include overview of scope and subject matter of rule
- Cite statutory authority for rule
- Identify small business regulatory coordinator (name, address, phone number, e-mail address) and small business ombudsman (IC 4-22-2-28.1)



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State Budget Agency and Office of Management and Budget Approval

- Fiscal impact of proposed rule on state and local government
- Required by Executive Order 2-89
- Agency calculates fiscal impact of proposed rule and submits proposed rule and fiscal impact statement to the State Budget Agency prior to publishing the proposed rule



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State Budget Agency and Office of Management and Budget Approval

- Cost – benefit analysis
- IC 4-3-22-14 and IC 4-22-2-28
- Executive Order 05-02
- Fiscal impact statement and cost-benefit analysis may be submitted to SBA/OMB prior to filing Notice of Intent
- See also Financial Management Circular 5.2



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Rulemaking docket IC 4-22-2-22.5

- Must be in place from publication of Notice of Intent until effective date of rule
- Must be kept current
- Agency can use IOT application or its own
- To ensure compliance with statute, call it “Rulemaking docket” or “Pending rules”



Rulemaking docket

- Must include:
 - Subject matter of the proposed rule
 - Notices or links to IR notices
 - How comments may be made
 - Time within which comments may be made



Rulemaking Docket

- Must also include
 - Where comments and agency's response may be inspected
 - Date, time, and place of public hearing
 - Relevant scientific and technical findings, if applicable
 - Reasonable estimate of the timetable for action, **updated as necessary**



Rulemaking Docket

- Small business ombudsman comments must be posted on the agency's website, and they may be included in the rulemaking docket
- Once a rule is effective, it can be removed from the docket
- **Include printout or screenshot and hyperlink in final rule packet**



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	[Agency-entered information]
LSA document number	XX-XXX
Rule description	Description of content of rule
Notice of intent	(IR link)
Proposed rule	(IR link)
Public hearing notice	(IR link)
Economic impact statement	(IR link)
Public hearing information	Date, time, place
E-mail address for comments	(email or "mail to" link)
Mailing address for comments	(name and address)
Deadline for comments	<i>Date</i>
Comments and the agency's response to comments may be inspected at this location	(agency address)
Small business ombudsman comments	(if applicable) <i>PDF document</i>
Other notices	<i>(This will sometimes be used for other IR notices.)</i>
Relevant scientific and technical findings (if applicable)	<i>(This will occasionally be used – link to PDF document or other source, possibly short text entry.)</i>
Final rule	<i>(link to IR)</i>
Effective date of final rule	<i>date</i>
Additional information	<i>(if agency needs to provide additional information that doesn't fit anywhere else, a link or short text info can go here.)</i>
ANTICIPATED TIMETABLE for rulemaking (subject to change)	
Anticipated date of publication of proposed rule	<i>Date</i>
Public hearing will take place at least 21 days after the publication of proposed rule	
Anticipated date of adoption of final rule	<i>Date</i>
Anticipated date final rule filed with the Indiana Register after approval by Attorney General and Governor	<i>Date</i>
Anticipated effective date of rule	<i>Date</i>



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Publication of Proposed Rule IC 4-22-2-24

- Published in the Indiana Register
- Include full text of proposed rule along with
 - Notice of public hearing
 - Economic Impact Statement
- REMINDER: Publication of proposed rule and notice of public hearing must be completed at least 21 days prior to public hearing.



Incorporation by reference IC 4-22-2-21

- Incorporation by reference makes an outside document part of the rule.
- Document must be fully and exactly described in the rule.
- The incorporated document is “frozen;” updates do not become part of the rule.
- Incorporated document must be filed with LSA (hard copy or electronic) unless previously filed with another rule.



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Incorporation by reference IC 4-22-2-21

- Texts and documents outside the rule that may be incorporated by reference:
 - Federal or state statute, rule or regulation
 - Code, manual or standard adopted by U.S., state, or nationally recognized organization or association
 - Certain Indiana DLGF manuals and information



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Notice of Public Hearing IC 4-22-2-24

- Published in Indiana Register along with Proposed Rule
- Also published in Indianapolis Star
- Publish at least 21 days before public hearing
- Include date, time and place of hearing



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Notice of Public Hearing IC 4-22-2-24

- Include statement justifying any requirement or cost that is
 - Imposed on a regulated entity under the rule
 - Not expressly required by the statute authorizing the rule, or any other state or federal law



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Notice of Public Hearing IC 4-22-2-24

- Include an explanation that the proposed rule and any data, studies or analysis relied on for the justification statement may be inspected and copied at the office of the agency



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Notice of Public Hearing IC 4-22-2-24

- Inadequacy or insufficiency of the subject matter description or the statement of justification does not invalidate the rulemaking action (but absence or inaccuracy could be problematic)
- Failure to include other required elements in the notice could invalidate the rulemaking action



Authorization to Proceed

- After proposed rule and public hearing notice are submitted to the publisher, the publisher notifies the agency of the intended date of publication and provides written or e-mailed authorization to proceed
- Allows agency to confirm that public hearing is at least 21 days after publication of notice
- Include a copy of the authorization to proceed in the rule packet



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Small Business Impact IC 4-22-2.1

- If a rule will impose requirements or costs on small businesses, the agency shall prepare a statement that describes the annual economic impact of a rule on all small businesses after the rule is fully implemented. IC 4-22-2.1-5(a).



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Small Business Impact IC 4-22-2.1

- Statement must be
 - Published with proposed rule in Indiana Register
 - Delivered to the Small Business Ombudsman in the Office of Small Business and Entrepreneurship no later than the date of proposed rule publication



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Small Business Impact IC 4-22-2.1-6

- Small Business Ombudsman must provide written comments at least seven days before the public hearing
- Comments received must be
 - Made available for inspection and copying at the offices of the agency
 - Posted on IN.gov (via the website of the agency promulgating the rule)
 - Made available at the public hearing
- Agency must respond in writing to comments prior to adopting the final rule



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\$500,000 Economic Impact Statement IC 4-22-2-28

- If a rule will have a total economic impact greater than \$500,000 on all regulated entities, agency must submit the proposed rule to the Office of Management and Budget
- Must be submitted to OMB at least 50 days before public hearing



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\$500,000 Economic Impact Statement IC 4-22-2-28

- Provide Legislative Council with copies of
 - Small Business Impact Statement
 - Cost Benefit Analysis
 - \$500,000 impact (if applicable)
- E-mail documents to Legislative Council (Legislative.Council@iga.in.gov) when they are submitted to OMB and include copy of email in rule packet



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Public Hearing IC 4-22-2-26

- May be conducted “in any informal manner that allows for an orderly presentation of comments and avoids undue repetition.”
- “The agency shall afford any person attending the public hearing an adequate opportunity to comment on the agency’s proposed rule through the presentation of oral and written facts or arguments.”



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Public Hearing IC 4-22-2-26

- Must take place on date and at time and place stated in the notice
- If date, time or place change, publish a Notice of Change in Public hearing in the Indiana Register and Indianapolis Star
 - See, e.g., page 35 of the Administrative Rules Drafting Manual
- May be recessed and reconvened on a different date or at a different time or place by announcing change at original hearing before the recess
 - Must record the announcement in the agency's record of the public hearing.



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Public Hearing IC 4-22-2-26

- Subject to Open Door requirements in IC 5-14-1.5
- Record of hearing may consist of minutes, transcript, or summary
- Individual or individuals that adopt the rule must fully consider all public comments received at hearing (IC 4-22-2-27)
 - Attendance at hearing or review of written record or summary is sufficient to constitute full consideration



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The 249th Day IC 4-22-2-25

- Agency has one year from the date of publication of Notice of Intent to obtain Governor's approval (or deemed approval)
- If one-year deadline will not be met, submit a notice to LSA before the 250th day after the Notice of Intent is published.



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The 249th Day IC 4-22-2-25

- LSA notice includes reasons for delay and expected date of approval
- If rule is not approved (or deemed approved) by the Governor within one year, or by expected date in LSA notice, rule is dead and new rulemaking must be started.



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Final Rule Adoption IC 4-22-2-29

- Final rule adoption, unlike other steps in the process, can't be delegated. The rule must be adopted by the individual or group of individuals (board, commission, etc.) with the statutory authority to adopt rules (IC 4-22-2-15)
- If adopted by a board, commission or other group, adoption must take place in a public meeting



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Final Rule Adoption IC 4-22-2-29

- Final rule need not be identical to proposed rule, but if it substantially differs, it must be a *logical outgrowth* of proposed rule and comments
- Agency may consolidate two or more proposed rules as one final rule, or adopt parts of proposed rule in two or more separate final adoption actions



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Attorney General Review

IC 4-22-2-31

IC 4-22-2-32

- All rules must comply with statutory steps for submission and are reviewed for form and legality within 45 days



Attorney General Review

Submission packet to OAG

- Final rule on CD (in Word, not PDF)
- Signature page
- Supporting documentation
- All materials incorporated by reference



Attorney General Review

Supporting Documentation

- Copies of all Indiana Register Documents
- Rulemaking docket
- Economic analyses and related documents
- Hearing notices
- Public hearing comments
- Agency's response to comments
- Documents related to adoption (meeting minutes, etc.)
- Summary of changes from proposed to final rule



Attorney General Review

- Agency may include additional documents and explanations to facilitate review
- An index and tabbed dividers labeling the appropriate rulemaking step is preferred.
- An explanation clarifying any unusual circumstances should be included when appropriate.



Attorney General Review

- Possible actions for OAG review
 - Approve
 - Take no action for 45 days (“deemed approved”)
 - Disapprove
 - Return to agency without disapproval
 - Agency may recall or withdraw rule



Attorney General Review

Grounds for disapproval

- Adopted without statutory authority
- Adopted without complying with rulemaking statutes
- Changes from proposed rule to final rule do not comply with IC 4-22-2-29(c)
 - Changes must be logical outgrowth of written comments received during the public comment period.
- Violates another law



Attorney General Review

OAG does not evaluate the policy or technicalities of a rule, except to determine that the rule is within the agency's statutory authority and does not violate another law



Attorney General Review IC 4-22-2-20

- Form of rule
 - is clear, concise, and easy to interpret and to apply
 - uses the format, numbering system, standards, and techniques established by LSA under IC 4-22-2-20



Attorney General Review

- If rule does not comply with form requirements, OAG may disapprove the rule, or return it to agency without disapproval
- If returned to agency, rule can be corrected without readoption (IC 4-22-2-32(e))



Attorney General Review

- A rulemaking action that does not comply with IC 4-22-2 does not have the effect of law (IC 4-22-2-44)
- OAG requires supporting documentation to determine compliance with IC 4-22-2 and IC 4-22-2.1



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Approval by Governor

IC 4-22-2-33

IC 4-22-2-34

- As a courtesy, OAG submits the rule to the Governor, on agency's behalf, after approval
- Governor may approve or disapprove a rule with or without cause
- 15 days to take action
- Governor can request an additional 15 days



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Submission to Publisher IC 4-22-2-35

- After Governor's approval, rule is submitted to publisher for filing
- LSA accepts it for filing and publishes a receipt in the Indiana Register
- Rule takes effect the *later* of
 - 30 days after it is accepted for filing; or
 - the effective date stated in the rule



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Recall of Rule IC 4-22-2-40

- A rule may be recalled by the agency at any time before it is accepted for filing
- A recall “unadopts” a rule and voids any approval given after the rule was adopted
- Agency may readopt an identical or revised rule
- A notice of recall is published in the Indiana Register
 - See page 39 of the Administrative Rules Drafting Manual for an example.



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Withdrawal of Rule IC 4-22-2-41

- The agency may withdraw the rule at any time before it is accepted for publication
- Withdrawal terminates the rulemaking action
- A notice of withdrawal is published in the Indiana Register
 - See page 40 of the Administrative Rules Drafting Manual for an example.



Other Rulemaking actions

- Readoption and expiration (IC 4-22-2.5)
- Rules expire January 1 of 7th year after effective date unless readopted.
 - Submit notice of readoption to Indiana Register (*see also* IC 4-22-2.5-4)



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Other Rulemaking actions IC 4-22-2-38

- Agency correction
 - Nonsubstantive rule change to correct typographical or other errors or to update certain outdated citations or references
 - Submit to Indiana Register for filing



Other Rulemaking actions

- Emergency rulemaking (IC 4-22-2-37.1)
 - Agency must have emergency rulemaking authority in statute
 - Most procedural and notice requirements do not apply
 - Expires 90 days after accepted for filing by LSA unless statute provides for a longer period
 - Can be extended once for additional 90 days
 - LSA maintains a list of agencies with emergency rulemaking authority:
<http://iac.iga.in.gov/iac//appendix-d-emergency%20rule%20authorities.pdf>.



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Office of the Attorney General Advisory Division

- The Attorney General is the legal advisor to all agencies in the drafting and preparation of rules (IC 4-22-2-22).
- The Advisory Division of the OAG is primarily tasked with assisting agencies with rule drafting questions.
 - The Advisory Division is comprised of 12 attorneys and 2 assistants.
 - Each attorney reviews rules as they are submitted on a rotating basis.



OFFICE OF THE INDIANA ATTORNEY GENERAL TODD ROKITA

Office of the Attorney General Advisory Division

- Agencies may request pre-review of proposed rules and related documents (hearing notices, economic impact statements, etc.)
 - Highly encouraged where there are form or legality questions.
- Pre-review can facilitate final rule review **but does not guarantee approval**, because procedural problems may occur during the promulgation process.



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Office of the Attorney General Advisory Division

- **Agencies are encouraged to seek advice and assistance from the Advisory Division when promulgating rules**
- William Anthony: william.anthony@atg.in.gov
- Philip Gordon: philip.gordon@atg.in.gov
- Jean Marie Leisher (Senior Paralegal): jean.leisher@atg.in.gov
- Celeste Croft: (Executive Assistant): celeste.croft@atg.in.gov

Administrative Rulemaking Seminar:

OMB and SBA Review



February 15, 2023

Justin McAdam

Deputy Director & Chief Legal Counsel

Patrick Price

Special Counsel, Office of Management and Budget
General Counsel, State Budget Agency

Roadmap of Presentation

I. OMB / SBA Review

- Overview
- Review In Practice
- Tips for Smooth OMB Review
- Time Required for OMB Review

II. General Rulemaking Requirements

- What must be included in a Rule
- What is a Rule
- Role of Rules

III. Cost-Benefit Analysis

- Overview
- Answer the “Why”
- How to Prepare Analyses
- Examples from cost-benefit analyses

V. Helpful Resources

VI. Questions



OMB Review Overview

Background

- OMB review provided in statute, IC 4-3-22-13 and IC 4-22-2-2
- Prereview established by Executive Order 13-03
- Financial Management Circular #5.1 (1/1/2022) defines OMB review process

Purposes

- Coordination between agency, SBA, OMB, and Governor's Office
- Evaluate whether burdens imposed by regulations are justified; IC 4-3-22-1
- Cost-benefit analysis



SBA Review Overview

Background

- Fiscal impact analysis required by Executive Order 2-89
- Cost-benefit analysis required by IC 4-3-22-13
- Financial Management Circular #5.2 (1/1/2022) defines review process

Purpose

- SBA assessment of fiscal impact



OMB / SBA Review In Practice

OMB Review

- Collaborative process between OMB, Governor's Office, and Agency
- Focus on rule language and cost-benefit analysis
- Should be completed before initiating formal rulemaking
- Process is deliberative and exempt from APRA (PAC opinion 17-FC-270)

SBA Review

- Fiscal Impact and Cost-Benefit analyses required for final approval
- Submitted for review after agency publishes Notice of Intent
- Proposed rule should match rule approved by OMB review
- Agency should identify and explain any substantive changes



Tips for Smooth OMB Review

- Be prepared to talk to us about the rule
 - Have everyone in the discussion at the same time – lawyers *and* subject matter experts
- Don't bite off too much
 - Rule only moves as fast as the slowest portion
 - Can break off higher priority portions to move through first
- Don't reinvent the wheel
 - modifying existing administrative code tends to be easier than a repeal and replace
- Consider hiring outside resources for big rules



Tips for Smooth Review (cont.)

- Identify what is new
 - redlines
 - changes from existing requirements)
- Check legal authority for each provision
- Feedback from interested parties
- Avoid duplication of statutory or CFR language (consider manuals)
- Include requirements from forms or policy
- Consider talking to OMB before drafting



Time Required for OMB Review

	Rules Approved	25% of rules approved in	50% of rules approved in	75% of rules approved in
2022	57	8 days	18 days	60 days
2021	33	9 days	12 days	34 days
2020	38	27 days	53 days	91 days
2019	50	55 days	89 days	135 days
2018	34	61 days	96 days	164 days



What Must be Included in a Rule?

Common Questions

- What must be in regulation and what can be in agency policy, forms, or manuals?
- Why isn't the agency policy enough?
- Can the requirement be included in the agency form?
- Can the statute be repeated in the rule? The rule is not comprehensive and doesn't tell people everything they need to know.

Starting Point

- Statute – Administrative Rules and Procedures Act specifies what is considered a rule
- Case Law – expands on this definition



What is a Rule – Statute

Indiana Code establishes what must be included in regulation

IC 4–22–2–3(b)

“Rule” means the whole or any part of an agency statement of general applicability that:

- (1) Has or is designed to have the effect of law; and
- (2) Implements, interprets, or prescribes:
 - (A) Law or policy; or
 - (B) The organization, procedure, or practice requirements of an agency.



What is a Rule – Case Law

Courts have adhered closely to the statutory definition

Rules have Four Elements

- *Villegas v. Silverman*, 832 N.E.2d 598 (Ind. Ct. App. 2005)
- An administrative rule is:
 - (1) “an agency statement of general applicability to a class;”
 - (2) that is “applied prospectively to the class;”
 - (3) that is “applied as though it has the effect of law,” and
 - (4) that “affect[s] the substantive rights of the class.”

“Effect of Law” means Mandatory

- *Ward v. Carter*, 90 N.E.3d 660 (Ind. 2018)
- “an agency regulation carries the effect of law when it prescribes binding standards of conduct for persons subject to agency authority.”
- “[I]f an agency rule acts as a coercive mechanism or wields coercive power over people, it carries the effect of law.”



Why is Policy Not Enough?

Because statute requires certain process for adoption

- Agency power to make rules flows from General Assembly
 - Agencies can only make rules where authorized by statute
- General Assembly requires rules to be adopted using certain process
 - Administrative Rules and Procedures Act (IC 4-22-2)
 - Requires due process (sort of)
 - *Villegas v. Silverman*, 832 N.E.2d 598 (Ind. Ct. App. 2005)
 - “These requirements dictate, among other things, public input into any proposed rule changes. The duty of the BMV to issue licenses in a manner that it deems prudent does not supercede the mandate to allow the public to participate in the rule-making process.”



Why is Policy Not Enough? (cont.)

Courts will not enforce rules without procedural steps

- Agency policies without rulemaking steps do not carry the effect of law
 - “We hold that the new identification requirements are a rule, and because they were not promulgated in accordance with the ARPA, they are void and without effect.” *Villegas*, 832 N.E.2d at 610
 - “IDEM may only regulate by a new rule if the proper rulemaking procedures have been followed.” *Indiana-Kentucky Elec. Corp. v. Comm’r, Indiana Dep’t of Env’t Mgmt.*, 820 N.E.2d 771, 780 (Ind. Ct. App. 2005)
- Examples of rule “alternatives” rejected by courts:
 - **Written policy:** *Villegas*, (required documents for driver’s license)
 - **Oral policy:** *Indiana-Kentucky Elec. Corp.*, (location of environmental monitoring equipment)
 - **Contract:** *Am. Trucking Associations, Inc. v. City of Los Angeles, Cal.*, 569 U.S. 641 (2013) (imposing “distinctive governmental” authority through contract)



What is a Rule – Examples

In General

- Requirements that must be met need to be in statute or regulation
- Basis for denying application or permit must be in statute or rule
- Basis for violation or enforcement action must be in statute or rule

Examples

- information required to be submitted in an application
- documents *required* to prove identification
- required equipment
- required training standards
- fees and fines
 - exact amount
 - formula - must define what you are doing and how it is calculated



Example 1 – BMV

Statute

- IC 9-24-16.5-1 The bureau shall issue a photo exempt identification card to an individual who meets the following conditions ... (2) Is an **Indiana resident**.

Regulation

- 140 IAC 7-1.1-3(b) An applicant must show proof of the following ... (4) Being an Indiana resident and of the applicant's **residence address, which may not be a post office box**, by submitting **two (2) documents showing proof of being an Indiana resident and two (2) documents showing the applicant's residence address**. Qualifying documents include the following ...

BMV Driver's Manual

- You must be a legal resident of Indiana to obtain an Indiana credential. Evidence of Indiana residency includes:
 - Maintaining a residential address in Indiana and not claiming residency in another state
 - Being a registered voter in Indiana
 - Having a dependent who is enrolled in an elementary or secondary school located in Indiana



Example 2 – DNR

Statute

IC 14-22-11: Establishes basic requirements for hunting licenses.

DNR Regulation

312 IAC 9-12-2(a): **In addition to the requirements for obtaining a hunting license under IC 14-22-11**, an individual born after December 31, 1986, must have successfully completed a course in hunter education by the department or the department's agent under IC 14-22-35-1 and this rule.

DNR Hunting Manual

Hunter education: Anyone born after Dec. 31, 1986 must successfully complete a DNR-offered hunter education class to purchase an Indiana hunting license.



Statute, Rule, or Manual / Policy

	Statute	Rule	Policy	Manual
Purpose	Set legal authority and basic requirements	Expand on basic requirements	Explain / clarify specific requirements	Synthesize and explain all requirements
Legally Enforceable	Yes	Yes	No	No
Requirements for Adoption	Set by Indiana Constitution	Set by Indiana statute	Set by internal agency policy	Set by internal agency policy
Language style	LSA bill drafting manual	LSA rule drafting manual	Typically, legal memo style	Common language
Comprehensive	Maybe, agency rules can supplement	No, does not include statutes	Usually focused on one issue	Yes, one-stop summary for public



Cost-Benefit Analysis – Overview

WHAT

- Document the net impact of a new rule

GOAL

- Justify new regulation by demonstrating that benefits exceed costs.

FOCUS

- Minimizing negative impacts and maximizing benefits of new rule.



Cost-Benefit Analysis – Steps

Step 1: Identify each new requirement in proposed rule

Step 2: Identify of impacted parties

Step 3: For each new requirement, identify benefits

Step 4: For each new requirement, identify the costs

Step 5: Aggregate the total benefits and costs for each requirement and the entire rule

Step 6: Explore mitigation options

Step 7: Seek input from affected on proposed rules



Identify All New Requirements

Step 1: Identify everything in the proposed regulation that is changing from current requirements

- Must identify all changes from existing regulation
 - Biggest reason for delays in OMB review
 - **Redlines** or another way to track changes
 - Lists or tables can be very helpful
- Identify any current requirements
 - Statute, other regulations, federal regulations, court orders, compacts, etc.
 - Can include in list, table, or annotations
 - Excluded from cost-benefit analysis of the rule



Who Is Impacted by Changes?

Step 2: Identify impacted parties

- Serves as the multiplier for costs / benefits
 - Consider impact on all persons affected by the rule (not just regulated persons)
 - Can exclude parties already in compliance from cost-benefit analysis
- Can determine from variety of sources
 - Agency records Calculations Research
 - Estimates Surveys



Example 1 – Impacted Parties

How to Identify Number of Impacted Parties

- **Sometimes you know**

- **PLA:** There are 60,993 beauty culture professionals, 8217 beauty culture salons, 99 beauty culture schools, and 498 tanning facilities holding active licenses in the State of Indiana.

- **Sometimes you can calculate**

- **Egg Board:** Total number of small businesses in Indiana who would be potentially impacted by the requirement for using new packaging materials is estimated to be 170 producer packers. This number was determined by the total of 540 small egg businesses minus 355 registered farm market retailers who would be exempt under the proposed rule. We then removed the 15 small wholesalers who are not packing their own eggs and would not have a direct cost associated with purchasing new packaging materials.



Example 2 – Impacted Parties

How to Identify Number of Impacted Parties

- **Sometimes you can estimate**
 - **IDHS:** It is estimated that this proposed rule will affect somewhere around 14,068 homes per year. This is the number of homes believed to be constructed each year in Indiana, based off building permit data obtained from the United States Census Bureau.
 - **Health:** Of the 54 Indiana counties responding to a survey, 50 local health departments reported that in 2020 there were a total of 4954 septic permits issued, or an average of 99.1 per local health department, and in 2021, 49 local health departments reported that there were a total of 4885 septic permits issued, representing an average of 99.5 permits per county. These were the years that the impact of COVID was most significant, and the number of permits issued may not be representative of past or future years. If this average of 99.5 permits were extended to all 92 counties in Indiana, that would give an approximate number of 9154 residential septic permits issued each year.



Benefits: Answer the “Why”

Step 3: Identify benefits for each change

- What is the benefit → it's the reason you are doing the rule
 - Benefits are positive externalities of the rule
- Who gets the benefits → usually someone other than the group regulated
 - Benefit is usually the value in solving the problem
- How to calculate benefits → same way you calculate costs, BUT ...
 - Often benefits are less certain
 - Can be more intangible and less concrete than costs
 - Usually require assumptions and estimates
 - Look to research studies (e.g., value of human life, quality adjusted life years)



Benefits: Motivation Examples

- **Health:** Individuals with a confirmed elevated blood lead level of 5 µg/dL and above can expect increased healthcare costs and a loss in lifetime earnings.
- **Egg Board:** According to a CDC report, there were 8 cases of Salmonella in Indiana that were attributed to back yard poultry flocks.
- **IURC:** NiSource, the parent company of Columbia Gas of Massachusetts, said restoration and payment of claims related to the Merrimack Valley gas disaster could cost greater than \$1 billion for that one incident. Even one smaller incident with fatalities can easily exceed tens of millions of dollars.
- **IDEM:** Persons impacted by military deployment unable to provide the necessary documentation or retake the examination within a specified amount of time.
- **Insurance:** The proposed rule is based upon Model #787 and must be adopted in each state in order for that state to maintain its accreditation with the NAIC. States failing to maintain NAIC accreditation will subject domestic insurers to financial examinations from each of the other NAIC-accredited jurisdictions.



Costs: Answer what it takes

Step 4: Identify costs associated with each change

- What is the cost → it's the burden of complying with the rule
 - Costs are negative externalities of the rule
- Who bears the costs → the parties regulated by the rule (and potential others who are indirectly affected)
 - Anyone who must change their behavior to interact with the regulated party
- How to calculate costs → same way you calculate benefits, BUT ...
 - Often costs are more certain and ascertainable
 - Can be more tangible and concrete than benefits
 - May require assumptions and estimates, but scope of impact should be mostly evident from rule
 - Look to surveys of regulated parties (e.g., what would it take to comply)
 - Exclude impacts and costs of existing compliance



Example 1 – Existing Compliance

Existing Compliance Reduces Cost Imposed by Regulation

- **Using Enforcement Records**

- **State Chemist:** There are currently approximately 300 regulated and potentially impacted government entities in Indiana. These government entities are broken down roughly as 75% (225) local, 23% (69) state, and 2% (6) federal. Based on routine government facility inspections by OISC, it is estimated that at least 80% of these government entities already have application recordkeeping systems in place.
- **IDHS:** IDHS employs EMS District Managers who are responsible for 2-3 IDHS districts and would handle EMS organizations in roughly 20 Indiana counties. The District Manager interacts frequently with the EMS providers in their districts and also will do organization visits or official audits. All new ambulances are inspected, so every time a new ambulance is put into service the District Manager will be on site. This is how they interact and discover the equipment and resources that are being used.



Example 2 – Existing Compliance

- **Using Surveys**

- **DOC:** A fiscal impact toolkit was developed to measure a detention facility's current level of compliance with the new standards, and if noncompliant, the extent of any fiscal impact to achieve compliance. All nineteen (19) juvenile detention facilities were provided the fiscal impact toolkit; of those, twelve (12) of the detention facilities completed the toolkit. A potential fiscal impact was reported for a total of nine (9) standards.

- **Using Surveys plus internet research**

- **BMV:** BMV has conducted a survey of all licensed driver education schools to determine how many vehicles this amendment would impact. Of the 80 schools that responded, five vehicles total were reported to not already have this safety feature in place. Assuming a replacement cost of \$13.99 for the mirror (determined via internet research), the anticipated cost to all licensed entities is approximately \$70.



Add It All Up

Step 5: Tally costs and benefits for each new requirement and aggregate for the entire rule

- For each new requirement, sum the benefits and costs
 - Multiply average costs / benefits by number of impacted parties
 - Exclude parties already in compliance from cost-benefit analysis
- Evaluate the net benefit for each requirement separately
 - Benefits from one requirement cannot offset costs of another
- Aggregate the calculation for each requirement to determine the total net benefit of rule
- Consider using a table



Example Tallying Costs

- **Number of impacted parties x Cost imposed – Existing compliance**
 - **PLA:** Dry needling courses are typically three days and include 27 to 29 hours of instruction. The estimated cost for a Physical Therapist to take two courses is \$1,300 to \$2,000, not including travel or lodging. Based on a survey that was sent to over 40 leaders of hospital physical therapy departments and physical therapy private practices across the state, approximately **239 licensed Physical Therapist have already completed 1 dry needling course** and approximately 76 license Physical Therapist have completed 2 or more dry needling courses. **The estimated cost for a Physical Therapist who has already taken one course would be \$600 to \$1,000**, not including travel or lodging, and Physical Therapists who have already completed 2 or more dry needling courses may not require any additional training. **The total estimated cost for existing Physical Therapists who have taken at least one dry needling course to meet the new standard is \$239,000.**



Ex. 1 – Weighing Costs and Benefits

Quantify the overall benefits of the regulation

- **Health:** Individuals with a confirmed elevated blood lead level of 5 $\mu\text{g}/\text{dL}$ and above can expect increased healthcare costs and a loss in lifetime earnings. A Columbia Law School review of one cohort of 1- and 2-year-olds in Texas in 2014 estimated that the per child societal costs of children with blood lead levels more than 5 $\mu\text{g}/\text{dL}$ was \$10,813. **This includes costs associated with immediate medical intervention, lead related ADHD, parental time-off work, special education costs, and lost earning potential.** It does not include pain and suffering, future-related adult medical expenses, or criminal justice costs. In Indiana, using the same conservative assumed per-child savings, **Hoosiers would see avoided costs of \$20.9M in for those children above 5 $\mu\text{g}/\text{dL}$ in year one.**



Ex. 1 – Weighing Costs and Benefits

Quantify the overall costs of the regulation

- **Health:** The Indiana Department of Health expects the reduction in the EBLT threshold to cost \$6,599,894 in year one and \$10,225,222 in year two. Costs will grow in years 3-5 with the additional children tested under universal screening, but will taper down in years 6-10 as the state moves to a targeted screening strategy. In total, this rule change, coupled with the new universal screening legislation, **will cost \$119,421,978 over a ten-year period.**



Ex. 2 – Weighing Costs and Benefits

Quantify the Overall Benefits of the Regulation

Egg Board:

- **Consumer safety**

- The majority of our 170 businesses who may reuse egg cartons are from small back yard flocks of 250 birds or less. According to a report from the Centers for Disease Control, there were **8 cases of Salmonella in Indiana that were attributed to back yard poultry flocks**. Nationally, 2017 saw the largest increase in the incidence of Salmonella in humans as a result of live poultry.

- **Product traceability**

- When egg cartons are reused there is an increased probability that the trace back information required on every egg carton can be incorrect or conflicting when multiple sets of information are present.
- In the event of a food borne illness contributed to egg consumption occurs, the **accurate and rapid trace back to the origin is vital**. Using only new cartons at retail will alleviate the potential to trace back to multiple origins and save significant resources.



Ex. 2 – Weighing Costs and Benefits

Quantify the Overall Costs of the Regulation

Egg Board:

- As of March 31, 2018, we have 139 registrants in this classification.
- Each of these registrants is required to report the volume of eggs they distribute. This information indicates that, on average, this group of producer retailers is distributing approximately 145,000 dozen eggs per year.
- Assumptions for calculating annual impact:
 - All eggs are marketed in 1 dozen egg cartons
 - New egg carton cost was calculated from an average of 3 on-line suppliers
 - Egg cartons are foam material, purchased in 100 carton packages
- The average price per carton = \$.42.
- The 145,000 dozen distributed by small businesses with a carton cost of \$.42 would result in a total annual economic impact of \$60,900 in increased cost, if all eggs were currently being marketed in used cartons. **Average annual per business cost is calculated to be \$438.13. Range** from (\$0 - \$2500 (all eggs retailed from a 250-bird flock)).



Example Summarizing Net Benefits

Tables Can Be Helpful to Summarize

Requirement	Impacted Parties	Average Benefit	Average Cost	Percent existing compliance	Total Benefit	Total Cost	Net Benefit	Comments
Requirement 1	1,000	\$400	\$50	46%	\$184,000	\$23,000	\$161,000	Existing compliance estimated from industry survey
Requirement 2	1,000	\$200	\$150	25%	\$150,000	\$112,500	\$37,500	Going to consider mitigation options to reduce costs
Requirement 3	1,000	\$10	\$2	99%	\$100	\$20	\$80	National standard has been in place since 2020 and enforcement records indicate almost complete voluntary compliance already



Attempt to Reduce Costs

Step 6: Explore mitigation options to reduce costs

- Even when regulation has net benefit, always explore ways to reduce costs
- Common techniques include:
 - Grandfathering
 - Delayed enforcement
 - Exceptions
 - Safe Harbors
 - Making it easier to comply
 - Transition assistance
- OMB happy to assist with brainstorming mitigation options



Example 1 – Minimizing Costs

Commonly used techniques to minimize costs imposed

- **Grandfathering**

- **Health:** “(i) This rule does not require existing onsite sewage systems to comply with updates made to this rule subsequent to the system’s installation, except to the extent necessary to fix a malfunction or failure.”

- **Safe Harbor**

- **DNR:** (i) A person who possesses or sells a boreal chorus frog that was lawfully acquired by the person does not violate this section if the person does each of the following:
 - (1) Lists the number of boreal chorus frogs in possession on a departmental form by October 1, 2021.
 - (2) Identifies the frog with an individually unique elastomer or another method of permanent marking approved by the director.
 - (3) Manages the frog in a manner that is likely to ensure the safety of the public and the health of the frog.



Example 2 – Minimizing Costs

- **Delayed Enforcement**

- **DNR:** “Effective October 1, 2021, “snare lock” means a device that creates and maintains a snare loop and prevents the loop after closure upon an animal from reopening to a diameter that allows the animal to escape. (regulation filed November 2020)
- **DNR:** a person must not:
 - (1) sell, offer or grow for sale, gift, barter, exchange, or distribute a species;
 - (2) transport or transfer a species; or
 - (3) introduce a species.

Subdivisions (1) and (2) are effective one (1) year after the effective date of this section.



Example 3 – Minimizing Costs

- **Making it Easier for Regulated Parties to Comply**

- **DNR:** (b) In order to be effective, a zone established under this rule must be identified by **coordinates or** on-site by buoys placed under 312 IAC 5-4.

Changed to:

- (b) In order to be effective, a zone established under this rule must be identified with **signage at the coordinates or** on-site by buoys placed under 312 IAC 5-4.

- **Consider human behavior**

- Try to harness human behavior and work with it, not against it
- Richard Epstein and [Nudge](#)



Example 4 – Minimizing Costs

- **Helping Regulated Parties with Transition**

- **DNR** will notify trappers and hunters of rule changes through news releases sent out electronically, updates on the website, and updated information in the Hunting & Trapping Guide that is printed and distributed each year.
- **BOAH** sends out emails to interested stakeholders so they are aware of upcoming rulemaking matters before the board. The BOAH posts the board agenda in a prominent location on the website so the rule information can be found on this page in addition to the rulemaking docket. The BOAH also sends out an issues newsletter to stakeholders on a quarterly basis.



Getting a Second Opinion

Step 7: Seek input from affected parties

- Many benefits to seeking input from affected parties *before* OMB review
 - We will ask 😊
 - Validates the work you have done
 - Regulated parties can identify factors you may have missed
 - Buy-in from regulated parties makes review easier
 - Avoids surprises
 - Avoids legislative response



Example – Input of Regulated Parties

Obtaining input of regulated parties can be very helpful

- **DHS:** Any amendments to this code were done in a public meeting, following the submission of a code change proposal that was posted on the Commission's website for public comment before being voted on by the subcommittee. The subcommittee contained members of the fire service industry, building inspection industry, architects, engineers, and builders. The subcommittee would discuss, and hear comments on, all proposals before voting on whether to adopt the code change proposal. This method of adoption was to ensure that the policy decisions were taking into account all sides of the issue (i.e. safety, cost, feasibility, etc.).
- **Gaming:** IGC has conducted three stakeholder meetings, on May 29, 2019, June 17, 2019, and on August 1, 2019, during which time regulations were discussed. In addition, on July 2, 2019, the IGC posted a draft emergency rule to its website, www.in.gov/IGC, and allowed any interested party to provide comment on the proposed regulations through August 1, 2019. Our final emergency rule was adopted by our Commission at our August 28, 2019 business meeting and submitted to LSA for posting and was placed on IGC's website.



Helpful Resources

Contact Information

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OMB Website

- Overview of OMB/SBA processes
- Links to key documents

Freakonomics - All You Need is Nudge



QUESTIONS?

